Supreme Court, U.S.
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No. 99-1730

In the Supreme Court of the United States

SILVIA H. GARCIA, *Petitioner*

v.

MONROE JONES, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the district court erred in dismissing respondent's claims for damages under 42 U.S.C. § 1997e(a).

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BRIEF IN OPPOSITION

Petitioner Sylvia Garcia, the Chief Deputy Warden of Calipatria State Prison in California, asks this Court to review an unpublished, unanimous opinion of the Ninth Circuit that is four paragraphs long. Pet. App. 1a-2a. According to petitioner, the decision below warrants an expenditure of this Court's scarce resources because it answers an important question of federal law incorrectly and conflicts with the decisions of other circuits. As explained below, the intercircuit conflict claimed by petitioner is vastly overstated; the precise issue set forth in the petition appears to arise infrequently (as demonstrated by the fact that the majority of circuits have yet to resolve it squarely even though more than four years have elapsed since the passage of the Prison Litigation Reform Act); and the decision below is manifestly correct. For all of these reasons, and because this case is any event a very poor vehicle for resolving the issue raised in the petition, review should be denied.

STATEMENT

1. Respondent Monroe Jones is a state prisoner who is currently incarcerated in Salinas Valley State Prison, in Soledad, California.[1] In January 1997, while incarcerated at another facility in the California system (Calipatria State Prison), Mr. Jones filed an action under 42 U.S.C. §§ 1983, 1985 and 1986 against petitioner Garcia, who is Calipatria's Chief Deputy Warden, and against "John and Jane Does

[1] The petition incorrectly states that Mr. Jones is still incarcerated at Calipatria State Prison. Pet. 3.

One Through Ten," naming all defendants in their official as well as their individual capacities. Pet. ii; Pet. App. 18a-19a, 29a-30a; Pet. C.A. Excerpt of Record ("C.A. ER") 1, 3. In his pro se complaint, Jones advanced a variety of federal constitutional claims and pendent state-law claims, all of which arose out of events that occurred at Calipatria following his transfer there in September 1995 from a third California facility, Folsom State Prison. See C.A. ER 1-12.

According to Mr. Jones's original complaint, while at Folsom he had been confined to administrative segregation for approximately nine months for allegedly belonging to a prison gang. C.A. ER 4. This punishment was based on confidential statements made to prison authorities by other inmates. *Ibid.* Jones has continuously and vigorously disclaimed membership in the gang and, before he left Folsom, that facility's Institutional Gang Coordinator certified that he was not a gang member. *Ibid.* Nonetheless, when Jones arrived at Calipatria, he was summarily placed in administrative segregation where he remained for three weeks. *Ibid.* The Institutional Gang Coordinator at Calipatria subsequently cleared Mr. Jones of any gang activity.

Respondent was then released into the general prison population and he was housed in "D" Facility. C.A. ER 4. Nine months later, however, he was transferred from "D" Facility to "A" Facility and was removed from his job as a result. *Ibid.* In "A" Facility, Jones was placed in a cell with a gang member. *Id.* at 4-5. He tried to resolve the matter informally by talking to prison officers but, when these efforts

proved unsuccessful, he filed a complaint with petitioner Garcia, the Deputy Warden. *Id.* at 5. In a letter dated December 16, 1996, petitioner Garcia denied Jones's request for single-cell status on the ground that it was a "duplicate request," the previous request had been denied administratively, and "this decision exhausted the Administrative remedy available to you within the Department of Corrections." *Id.* at 11. Ms. Garcia also explained that Jones's transfer from "D" Facility to "A" Facility was "due to a program realignment of the facilities and was not adverse." *Ibid.* Finally, Garcia indicated that based upon her review of Mr. Jones's file, she was rejecting his "claims of '[i]ncompatibility' and life being in jeopardy" stemming from his placement in a cell with a gang member. *Ibid.*

In his original complaint, Jones alleged among other things (1) cruel and unusual punishment in violation of the Eighth Amendment, on the basis of his placement in administrative segregation as well as in a cell with a gang member; (2) denial of due process in violation of the Fourteenth Amendment, on the basis of his (a) placement in administrative segregation in reliance upon false charges of gang membership, and (b) loss of his prison job due to his transfer from "D" Facility to "A" Facility; and (3) denial of equal protection, in violation of the Fourteenth Amendment. C.A. ER 7-8;

Pet. App. 18a. Jones sought compensatory and punitive damages as well as injunctive relief. *Ibid.*[2]

2. Garcia moved for dismissal on two grounds: the complaint failed to state a valid claim, and Jones had failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e. Amended by a provision of the Prison Litigation Reform Act of 1995 ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321-71, Section 1997e provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

The district court granted Garcia's motion to dismiss for failure to state a claim but — significantly — denied her motion to dismiss based on Jones's failure to exhaust prison grievance procedures. Pet. App. 18a-32a. In rejecting Garcia's exhaustion argument, the district court explained:

> [T]he PLRA is silent as to when the exhaustion requirement is satisfied — for example, is it sufficient for a plaintiff to have presented his or her claims within the inmate grievance system? Does exhaustion require a decision on plaintiff's claims at the California Department of Corrections (CDC) Director's level? Is exhaustion required for damages claims even though an inmate cannot obtain damages within the inmate grievance system? Furthermore, plaintiff provides

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[2] The standard complaint form filled out by Jones included various questions concerning what steps were taken by the inmate to secure relief through the prison grievance procedure. See C.A. ER 2. In answer to these questions, Jones indicated that he had filed several written complaints (known as "Form 602"s) under the California Department of Corrections ("CDC") grievance procedure and had written letters of complaint to Deputy Warden Garcia, Warden Prunty, and a prison sergeant. *Ibid.*

> evidence that he has presented the facts of his claims to the inmate grievance procedure. Plaintiff alleges that he has filed "two 602 State Appeals, and several Letters of complaints to the Deputy Warden and the Program Sergeant." (Complaint para. II(B), (C).) Plaintiff attaches to the complaint a CDC Memorandum dated December 16, 1996, which indicates that: 1) plaintiff has exhausted CDC administrative remedies with respect to his claims based upon placement in a cell with a gang member; and 2) plaintiff has at least informally presented to the prison his claims based upon false charges of gang membership and transfer between Calipatria facilities. (Complaint Exhibit A.)

Id. at 20a-21a. On the basis of this reasoning, the district court concluded that "at this stage in the proceedings" Mr. Jones's complaint should not be dismissed for failure to exhaust the prison grievance procedures. *Id.* at 21a. The court granted Jones 45 days in which to file an amended complaint that would state a proper claim for relief. *Id.* at 31a-32a.

3. On September 23, 1997, Jones filed an amended complaint. C.A. ER 29-39. As the district court noted, Jones "use[d] the amended complaint as an opportunity to add additional information to his original complaint, in an effort to correct the defects identified by this Court's July 25, 1997 Order granting defendant's motion to dismiss, without reasserting the information contained within [the original] complaint." Pet. App. 3a n.1. In expanding upon the Eighth Amendment allegations of the original complaint, Jones claimed that during his three-week stay in administrative segregation, he was assaulted by his cell mate at a time respondent was handcuffed while several correctional officers looked on. C.A. ER 30-31, 33-34. Jones also alleged that as he remained handcuffed and as the warden looked on, several correctional officers,

pepper-sprayed him, struck him "twenty times at leas[t]" with a baton, and dragged him into another cell. *Id.* at 30-31, 34. Jones further alleged that he was denied adequate medical attention for his injuries, denied the food and clothing normally available to the inmates, denied access to his property, and denied access to the law library. *Id.* at 31. Finally, he alleged in the amended complaint that "all administrative remedies[] were exhausted" with respect to his Eighth Amendment claims. *Ibid.*

Garcia again moved to dismiss the complaint for failure to state a valid claim. Pet. App. 5a. In support of that motion, she also pointed to "new allegations" in the amended complaint and argued that, "if the Court interprets these new allegations to be separate 'stand alone' claims, they must be dismissed as [Jones] has not alleged in his amended complaint that he has exhausted his administrative remedies *as to each and every new allegation*." Memorandum of Points and Authorities in Support of Motion to Dismiss Amended Complaint, at 16-17 (filed on October 22, 1997) (emphasis added). Garcia acknowledged that the district court, in rejecting a similar argument with respect to the original complaint, had relied on the fact that Jones "alleged that [he] had filed two CDC 602's." *Id.* at 17 n.9. But Garcia suggested that the situation had changed because Jones had "not alleged in the amended complaint that he has even attempted to exhaust his administrative remedies with regard to the newly alleged assault and denial of medical treatment (and other allegations)." *Ibid.* Thus, Garcia in

essence faulted Jones's allegation in the amended complaint that he had exhausted "all administrative remedies[]" (C.A. ER 31) as being too general in nature. Garcia noted as well that "since the type of relief sought by [Jones] is unknown, administrative remedies cannot be said to be inapplicable." Memorandum of Points and Authorities in Support of Motion to Dismiss Amended Complaint, at 17 n.9.

In an unpublished decision, the district court dismissed the amended complaint for failure to state a valid claim. Pet. App. 3a-17a. As an initial matter, the court explained that because "an amended pleading completely supersedes any earlier pleading," Jones's failure in the amended complaint to "reallege the relevant facts to support his claims" in the original complaint was "fatal to this instant complaint." *Id.* at 3a n.1. Nevertheless, the court proceeded to discuss the claims in both documents "[i]n the interest of affording a pro se litigant in a civil rights case adequate opportunity to correct these deficiencies." *Ibid.*[3] Examining each of Jones's claims in turn, the court concluded that — for a variety of reasons — none stated a valid claim for relief. *Id.* at 6a- 17a. With respect to each claim, the district court also faulted Jones for "fail[ing] to include *evidence*" with the amended complaint that would show "that he has exhausted his administrative appeals as required under 42 U.S.C. § 1997e." *Id.* at

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[3] The district court also noted that respondent had sought to amend his complaint to name four more defendants (officers Sudue, Huey, Davis and McKenny) in addition to Chief Deputy Warden Garcia. Pet. App. 4a n.2. The court indicated that "upon filing a second amended complaint, plaintiff may name these officers as defendants in this action." *Ibid.*

9a (emphasis added); see also *id.* at 10a & n.6 (stating that respondent "must also include *proof* of exhaustion in any future complaint by attaching copies of the relevant administrative appeals submissions and orders") (emphasis added); *id.* at 11a & n.7, 12a, 13a, 15a, 16a (same).

4. Jones appealed to the Ninth Circuit. The form that he used as the basis for his handwritten opening brief included the question whether Jones had "exhaust[ed] all administrative remedies for each claim prior to filing [his] complaint in the district court"; Jones replied, "Yes, they were filed by 602 all the way to Sacramento, final disposition." Resp. C.A. Br. 5 (emphasis omitted).

In response, Garcia contended that the district court was correct to dismiss for failure to exhaust on the ground that Jones had failed to provide "'proof of exhaustion * * * by attaching copies of the relevant administrative appeals submissions and orders.'" Pet. C.A. Br. 13 (quoting Pet. App. 10 n.6). In a footnote, Garcia acknowledged the Ninth Circuit's decision in *Lunsford* v. *Jumao-As*, 155 F.3d 1178 (1998), which held Section 1997e does not require a federal prisoner with a damages-only claim in a *Bivens* action to exhaust administrative grievance procedures that do not include a damage remedy, but distinguished *Lunsford* on the ground that Jones was "seek[ing] both injunctive relief and damages." Pet. C.A. Br. 11 n.3.

In his reply brief, Jones indicated that he had been transferred from Calipatria State Prison to Corcoran State Prison and from there to Salinas Valley State Prison.

Resp. C.A. Reply Br. 1. Jones argued that because Salinas Valley State Prison lacked the authority to grant any administrative relief concerning conditions in Calipatria, there was "no longer any [i]njunctive relief[] to be received that could be exhausted by the administrative remedies," and he now had "only * * * a [d]amage [c]laim against Garcia." *Id.* at 3.

5. In an unpublished decision, a panel of the Ninth Circuit unanimously reversed the dismissal order. Pet. App. 1a-2a. The panel noted that while Jones's complaint sought both damages and injunctive relief, he had "waive[d] his claims for injunctive relief" in his reply brief on appeal. *Id.* at 2a. Citing *Rumbles* v. *Hill*, 182 F.3d 1064 (9th Cir. 1999), cert. denied, 120 S. Ct. 787 (2000), which "extended *Lunsford* to section 1983 actions" (*id.* at 1068) and which held that Section 1997e(a) "does not deprive federal court[s] of subject matter jurisdiction when money damages is the sole relief sought and when such a remedy is not available through [a] prison's administrative grievance process" (Pet. App. 2a), the panel reversed the trial court's dismissal order and remanded "for further proceedings consistent with this disposition." *Ibid.* The panel's decision was filed on February 2, 2000, and the mandate issued from the Ninth Circuit on February 24. Garcia did not seek panel or en banc rehearing in the Ninth Circuit.

6. On remand from the Ninth Circuit, the district court, in an order filed on March 23, 2000, noted that its previous dismissal of the complaint had rested not only

on Jones's failure to exhaust all administrative remedies but also on his failure to plead sufficient facts to make out his various Section 1983 claims. To address the latter deficiency, the district court granted Jones leave to file a second amended complaint and directed him to do so within 45 days. The district court warned that if Jones failed to file an amended complaint within 45 days, "his case *will be terminated* without further warning." 3/23/00 Order, at 4 (emphasis in original).

7. On April 3, 2000, petitioner Garcia filed a motion asking the Ninth Circuit to recall the mandate and stay its enforcement. Petitioner indicated that she would be filing a petition for certiorari and argued for the first time (in language closely paralleling that in her cert. petition) that there was a conflict in the circuits and that the Ninth Circuit's unpublished decision ignored the statute's language and legislative history. On April 20, 2000, the Ninth Circuit panel summarily rejected these arguments and denied petitioner's motion for recall of the mandate and for a stay. Shortly thereafter, on April 28, the petition for certiorari was filed in this case.

8. On May 11, 2000, petitioner filed a motion in the district court asking it to stay all proceedings as well as to grant *respondent* an extension of time in which to file a second amended complaint beyond the 45 days specified in the March 23 order. In support of that motion, petitioner filed a declaration of her counsel, Deputy Attorney General James M. Humes (counsel of record for petitioner in this case), in which Mr. Humes explained that a petition for certiorari had been filed and expressed concern that

"if the proceedings in [the district court] were to proceed in an unnecessarily hurried manner," the "issue sought to be reviewed in the Supreme Court * * * could become moot and evade review." 5/4/00 Decl. of James M. Humes (filed on May 11, 2000), at 3. In support of his request that Mr. Jones be granted an extension of time, Mr. Humes noted that Jones had been moved to another facility, the Salinas Valley State Prison, and had not received the district court's March 23 order. *Ibid.*

9. On May 11, 2000, the district court issued an order taking note of petitioner's argument about the pendency of her petition for certiorari in this case and the asserted need "to preserve the existence of a justiciable case or controversy under Article III," and granting Mr. Jones until July 3, 2000 to file an amended complaint. The district court again warned Jones, who is proceeding pro se in that forum, that "his case will be *terminated* without further warning" if he fails to file a second amended complaint. 5/11/00 Order, at 3 (emphasis in original). The district court also directed petitioner to "submit supplemental briefing on the issue of why this Court has jurisdiction to stay the instant proceedings pending Supreme Court review." *Ibid.* After petitioner filed a supplemental brief arguing that the district court should exercise its "inherent" power to stay the proceedings to "ensure[] the justiciability of the petition for certiorari," Mr. Jones filed an opposing brief in which he indicated that he did not intend to file an amended complaint in this case. Defendant's Supplemental Briefing

Re: Jurisdiction to Stay Proceedings, at 2, 4 (filed on May 30, 2000); Plaintiff's Opposition, at 1 (filed on June 15, 2000).

REASONS FOR DENYING THE PETITION

As the foregoing procedural history makes clear, this case is a singularly inappropriate vehicle for resolving the question presented in the petition for certiorari. Not only is there a substantial risk (which petitioner has acknowledged in the lower court) that this case may become nonjusticiable, but also it is far from clear that the outcome would be any different even if petitioner were to prevail in this Court (because respondent clearly *alleged*, in his complaint, that he had exhausted all administrative remedies; and the trial court ordered his complaint dismissed only because it erroneously required him to *prove*, through the submission of documentary evidence, that this allegation was true). Moreover, petitioner never sought panel or en banc rehearing in the Ninth Circuit and indeed presented her interpretation of Section 1997e for the very first time below in a motion to recall the mandate filed approximately two months *after* the court of appeals issued its decision. This Court ordinarily does not entertain arguments never presented in a timely fashion to the lower courts.

Even if these glaring vehicle problems were not present, this case would not warrant this Court's review. To begin with, the intercircuit conflict claimed by petitioner is exceedingly weak. At a minimum, this Court should allow further percolation of the issue so that the lower courts can shed further light on the meaning of

Section 1997e (and perhaps resolve any tension in the circuits' positions through en banc proceedings). What is more, the precise issue set forth in the petition appears to arise infrequently (as demonstrated by the fact that most of the circuits have yet to resolve it even though more than four years have elapsed since the passage of the Prison Litigation Reform Act). And finally, review should be denied because the decision below is manifestly correct.

I. This Case Is An Inappropriate Vehicle For Resolving The Question Presented.

For at least three independent reasons, this case is an exceedingly poor vehicle for resolving the question presented in the petition for certiorari. Even if this case satisfied all of the Court's traditional critieria of certworthiness (which it does not), review should be denied on this ground.

a. Most obviously, there is a substantial possibility that this case will become moot in the near future. As explained above, the Ninth Circuit's mandate has already issued and the district court, on remand, has clearly indicated — twice — that unless respondent files an amended complaint that meets the court's satisfaction, it will dismiss this case. As petitioner has admitted in multiple submissions in the lower courts, that result would effectively moot the case in this Court.

Nor is the possibility of such a dismissal hypothetical or remote. The district court has twice dismissed respondent's complaint for failure to state a valid claim. On

remand from the decision petitioner seeks to have this Court review, the trial court indicated that its prior order rested as well on repondent's failure to state a valid claim. Moreover, respondent (who is proceeding pro se in the trial court) has indicated that he does not intend to file another amended complaint. And while petitioner has asked that the trial court invoke its "inherent" power to keep the case alive in this Court, the district court has expressed uncertainty about its own authority to stay the proceedings before it. Under these circumstances, there is a substantial possibility that this case will become moot sometime in the future. For that reason alone, review should be denied.

b. Equally problematic is the fact that petitioner never suggested, in the lower courts, that 42 U.S.C. § 1997e abolishes the traditional futility exception to the exhaustion doctrine and requires a prisoner to engage in the exercise of resorting to all levels of a prison grievance procedure even though it is a complete waste of time to do so. The first time petitioner even hinted at this remarkable interpretation was after the briefing in the court of appeals was completed, a decision had been rendered, and the time for rehearing had expired. Indeed, it was approximately two months after losing in the Ninth Circuit that the state of California, representing petitioner, raised this issue through a motion to recall the mandate (filed on April 3, 2000). Petitioner has offered no excuse for her failure to raise the point sooner, including in a suggestion for

rehearing en banc.[4] This Court does not ordinarily grant review to consider arguments never presented in a timely fashion in the courts below.[5]

c. Even if petitioner had made the argument set forth in the petition in a timely fashion below, and even if there were not a substantial possibility that this case will become moot, this is a very poor vehicle for resolving the question presented by petitioner. The reason is straightforward: it is far from clear that the result would be any different even if petitioner were to prevail in this Court. Because a ruling in petitioner's favor would likely amount to a mere advisory opinion, review should be denied.

As explained above, the district court *rejected* petitioner's first attempt to obtain dismissal for lack of exhaustion, reasoning that Section 1997e *was satisfied* by the allegations in respondent's original complaint that he "filed 'two 602 State Appeals, and several Letters of complaints to the Deputy Warden and the Program sergeant,'"

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[4] The California Attorney General's failure to raise the issue earlier in the Ninth Circuit is especially inexcusable because he had made all the same arguments in a petition for certiorari that was filed in *Rumbles*. See No. 99-537 Pet. for Certiorari, *Hill* v. *Rumbles* (filed on September 27, 1999). The petition for certiorari in *Rumbles* was denied on January 10, 2000, almost a month before the Ninth Circuit issued its decision in this case. See 120 S. Ct. 787.

[5] To make matters worse, it is at least arguable that petitioner *acknowledged* in the district court that exhaustion might not be required under Section 1997e(a) if the prison administrative process was incapable of supplying the relief sought by a prisoner. See Memorandum of Points and Authorities in Support of Motion to Dismiss Amended Complaint (filed on October 22, 1997), at 17 n.9 (stating that "since the type of relief sought by [Jones] is unknown, administrative remedies *cannot be said to be inapplicable*") (emphasis added). Because this statement was made before the Ninth Circuit decided either *Lunsford* or *Rumbles*, it necessarily reflects the Attorney General's understanding of the plain meaning of Section 1997e(a)'s language. See also pages 25-28, *infra*.

and by respondent's submission of a "CDC Memorandum * * * indicat[ing] that" he had "exhausted CDC administrative remedies with respect to his claims based upon placement in a cell with a gang member; and * * * at least informally presented to the prison his claims based upon false charges of gang membership and transfer between Calipatria facilities." Pet. App. 20a-21a. Although the trial court reached a different conclusion with respect to the amended complaint and petitioner's *second* motion to dismiss, that conclusion may well have rested on an unwillingness of the district court to consider the allegations relating to exhaustion in the original complaint (or the CDC Memorandum). If so, then the district court's ruling rests on a rather technical point relating to the relationship between the original and amended complaints, and not on any actual failure of respondent to exhaust his administrative remedies (which the district court concluded he had done with respect to the original complaint).

Moreover, in dismissing the amended complaint the trial court ignored respondent's unequivocal allegation in that document that "all administrative remedies[]" had been "exhausted" with respect to his allegations. C.A. ER 31. The district court faulted respondent for "fail[ing] to include *evidence*" with the amended complaint that would show "that he has exhausted his administrative appeals as required under 42 U.S.C. § 1997e." Pet. App. 9a (emphasis added); see also *id.* at 10a & n.6 (stating that respondent "must also include *proof* of exhaustion in any future complaint by attaching copies of the relevant administrative appeals submissions and

orders") (emphasis added); *id.* at 11a & n.7, 12a, 13a, 15a, 16a (same). The district court's decision to dismiss the amended complaint for failure to exhaust thus appeared to turn on the highly fact- and case-specific issue of how much proof was submitted by respondent in support of his allegation of exhaustion.

Moreover, the district court's ruling probably rested on a misunderstanding of the nature of the exhaustion defense. The district court appears to have assumed, incorrectly, that Section 1997e affected its subject matter jurisdiction (and therefore placed on respondent the burden of *proving* that Section 1997e had been satisfied). In fact, as the Ninth Circuit subsequently made clear in *Rumbles*, Section 1997e does *not* implicate the court's subject matter jurisdiction; it merely confers a right on defendants that may be waived if not invoked. See 182 F.2d at 1067-68; accord *Nyhuis* v. *Reno*, 204 F.3d 65, 69 n.4 (3d Cir. 2000); *Perez* v. *Wisconsin Dept. of Corrections*, 182 F.3d 532, 535-36 (7th Cir. 1999). "A prisoner's failure to exhaust administrative remedies before filing a claim constitutes an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure." *Massey* v. *Helman*, 196 F.3d 727, 735 (7th Cir. 2000), pet. for cert. filed (May 30, 2000) (No. 99-1918); see also *Jenkins* v. *Haubert*, 179 F.3d 19, 28-29 (2d Cir. 1999). Because failure to exhaust is an affirmative defense, petitioner — not respondent — had the burden of proving that (contrary to respondent's allegation and prior showing) the admnistrative remedies had not been fully exhausted. *Massey*, 196 F.3d at 735.

Finally, this case is unusual because it involves an amended complaint that builds upon an original complaint that the district court determined passed muster under Section 1997e. In arguing for dismissal of respondent's amended complaint for failure to exhaust administrative remedies, petitioner focused on the "new allegations" in the amended complaint and argued that, "*if* the Court interprets these new allegations to be *separate* 'stand alone' *claims*, they must be dismissed as Plaintiff has not alleged in his amended complaint that he has exhausted his administrative remedies *as to each and every new allegation*." Memorandum of Points and Authorities in Support of Motion to Dismiss Amended Complaint (filed on October 22, 1997), at 16-17 (emphasis added). In ordering dismissal, the district court evidently accepted the premise of this argument as true (a debatable point) and went on to apply the exacting approach advocated by petitioner, according to which "each and every" allegation in a civil rights complaint must be raised with specificity in an inmate grievance procedure in order to satisfy Section 1997e. Of course, if Section 1997e does not embody such a slavishly literalistic, jot-and-tittle pleading requirement (and we think it does not), then the district court was wrong for yet another independent reason.

Because the Ninth Circuit's reversal was correct for all of these independent reasons, review should be denied. This Court should not expend its scarce resources resolving an issue that likely will make no difference to the outcome of the case before it.

II. The Intercircuit Conflict Alleged By Petitioner Is Weak.

Petitioner maintains that there is a "pronounced" and "entrenched" conflict in the circuits over whether Section 1997e(a) requires prisoners to exhaust internal prison grievance procedures even when those procedures offer no possibility of relief. Pet. 5-6. Specifically, petitioner argues that the Ninth Circuit's approach is consistent with decisions of the Fifth and Tenth Circuits, but conflicts with the approach taken by the Third, Sixth, Seventh and Eleventh Circuits. Petitioner's claim of conflict is seriously overstated.

To be sure, petitioner is correct in observing that the Ninth Circuit's approach has also been endorsed by the Fifth and Tenth Circuits. *Whitley* v. *Hunt*, 158 F.3d 882, 887 (5th Cir. 1998) ("We join the Ninth and Tenth Circuits in adopting the rule that federal prisoners pressing *Bivens* claims against federal officials need not pursue prison remedies when they are seeking exclusively monetary relief, and there are no prison remedies capable of affording such relief."); *Garrett* v. *Hawk*, 127 F.3d 1263, 1266-67 (10th Cir. 1997) (adopting same rule).[6]

Petitioner claims that the Third and Eleventh Circuits have reached the opposite conclusion. Pet. 5-6 (citing *Nyhuis* v. *Reno*, 204 F.3d 65 (3d Cir. 2000), and

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[6] Petitioner notes that a subsequent panel of the Fifth Circuit has voiced disagreement with the result in *Whitley*, and urged the parties to seek en banc review. See *Wright* v. *Hollingsworth*, 201 F.3d 663 (5th Cir. 2000), pet. for reh'g en banc filed (Feb. 29, 2000). Unless and until the Fifth Circuit decides both to rehear the issue en banc and to overrule *Whitley*, however, the Fifth Circuit's approach will remain consistent with the Ninth Circuit's.

Alexander v. *Hawk*, 159 F.3d 1321 (11th Cir. 1998)). She freely admits, however, that both of those cases involved claims not only for damages but also for injunctive relief. Pet. 5; see *Nyhuis*, 204 F.3d at 67, 70; *Alexander*, 159 F.3d at 1322-23; see also *Booth* v. *Churner*, 206 F.3d 289, 299-300 & n.10 (3d Cir. 2000) (citing *Nyhuis* and reaching same result in case where prisoner asserted claims for damages as well as injunctive relief in his complaint), pet. for cert. filed (June 5, 2000) (No. 99-1964). With one very recent exception, the courts of appeals have uniformly ruled that such "mixed" claims must be exhausted because of the possibility that an inmate might obtain some measure of relief in the administrative process on his or her non-damages claims. See *Nyhuis*, 204 F.3d at 70; *Alexander*, 159 F.3d at 1325.[7] In addition, the Eleventh Circuit in *Alexander* expressly distinguished the Tenth Circuit's decision in *Garrett* on the ground that the latter "involved claims for only monetary relief," whereas "Alexander seeks both monetary and injunctive relief." 159 F.3d at 1327. Accord *Nyhuis*, 204 F.3d at 70 (stating that case before it was "distinguishable" from *Garrett* and from decisions of the Fifth and Ninth Circuits because the prisoner "requests a mix of remedies, some of which were and some of which were not available under the Bureau of Prisons' administrative process."). Because *Alexander*

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[7] The lone exception is the Tenth Circuit, which recently held that in mixed cases where money damages are not available through the inmate grievance procedure, a prisoner may proceed *on the damages claims* in federal court without first submitting those claims to the inmate grievance procedure. See *Miller* v. *Menghini*, 2000 U.S. App. LEXIS 11028 (10th Cir. May 18, 2000).

and *Nyhuis* involved mixed claims as to which exhaustion of administrative procedures was not futile, statements in those cases about how damages-only claims would be treated was obviously dicta that any subsequent panels in those circuits would be entirely free to disregard.

That leaves two circuits that petitioner claims have taken positions that conflict with the decision below — the Sixth Circuit in *Wyatt* v. *Leonard*, 193 F.3d 876, 878 (1999), and the Seventh Circuit in both *Massey* v. *Helman*, 196 F.3d 727 (2000), pet. for cert. filed (May 30, 2000) (No. 99-1918), and *Perez* v. *Wisconsin Dept. of Corrections*, 182 F.3d 532 (2000). As the Third Circuit correctly observed in *Nyhuis*, however, the Seventh Circuit appears to acknowledge that Section 1997e does not require a prisoner seeking only monetary relief to resort to an inmate grievance procedure where that procedure truly offers no prospect of a remedy. *Nyhuis*, 204 F.3d at 69 n.3. Thus, in *Perez*, Judge Easterbrook, writing for the panel, explained that the lawsuit of a prisoner who was seeking only monetary relief for inadequate medical care should have been dismissed under Section 1997e because the inmate failed to exhaust prison remedies that might have provided some relief — even though the relief provided was not the "prisoner's *preferred* remedy." 182 F.3d at 537 (emphasis in original). Judge Easterbrook reasoned that if the prisoner had sought intra-prison relief for his back injury, the state might have opted for the surgery desired by the inmate. Therefore, the Seventh Circuit required exhaustion where *some* relief was

possible, even if the relief is not the "prisoner's *preferred* remedy." *Ibid.* Judge Easterbrook noted, however, that "[i]t is possible to imagine cases in which the harm is done and no further administrative action could supply *any* 'remedy.'" *Id.* at 538 (emphasis added). Judge Easterbrook gave the following illustration:

> Suppose [a] prisoner breaks his leg and claims delay in setting the bone is cruel and unusual punishment. If the injury has healed by the time suit begins, nothing other than damages could be a 'remedy,' and if the administrative process cannot provide compensation then there is no administrative remedy to exhaust.

Ibid. Thus, petitioner is wrong to say that the Seventh Circuit interprets Section 1997e as imposing an absolute requirement, in every case, that inmates "avail themselves of prison grievance procedures, even when these procedures" do not provide any possibility of a remedy. Pet. 5.[8]

Nor does the Sixth Circuit read Section 1997e as imposing the absolute, inflexible exhaustion command urged by petitioner. True enough, the court in *Wyatt* did hold that under Section 1997e, a prisoner seeking only monetary relief must exhaust internal prison grievance procedures even when those procedures do not offer damages as a remedy. But the Sixth Circuit also stated:

> Although it makes sense to excuse exhaustion of the prisoner's complaint where the prison system has a flat rule declining jurisdiction over such cases, it does not make sense to excuse the failure to exhaust when the prison system will hear

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[8] In *Massey*, the Seventh Circuit reiterated Judge Easterbrook's hypothetical but found that the prisoner did not qualify as someone for whom the administrative process truly offered no possibility of relief. See 196 F.3d at 734.

> the case and attempt to correct legitimate claims by providing some remedy, even though it will not pay damages. In *Perez* v. *Wisconsin Dep't of Corrections*, 182 F.3d 532 (7th Cir. 1999), the Seventh Circuit made this distinction in a state prisoner medical case. It held that a prisoner must exhaust administrative remedies in a money damages case unless administrative action could provide no remedy of any kind.

Wyatt, 193 F.3d at 878. Accord *Freeman* v. *Francis*, 196 F.3d 641, 643 (6th Cir. 1999). Thus, the Sixth Circuit appears not only to agree with the Seventh Circuit's position in *Perez*, but also to recognize a further exception to Section 1997e when the relevant prison grievance procedure "has a flat rule" excluding certain types of claims (such as tort claims) from consideration.

The point is not that the Sixth and Seventh Circuits follow exactly the same reading of Section 1997e that has been adopted by the Fifth, Ninth and Tenth Circuits. They do not: while the latter circuits will excuse exhaustion where the type of relief sought by the inmate is not available in the inmate grievance procedure, the Sixth and Seventh Circuits will look further and excuse exhaustion only where no *other* form of relief could be provided by that procedure (even relief that is different from the kind requested by the inmate). Moreover, the Sixth Circuit will excuse exhaustion when the prison grievance procedure excludes a category of claims from any consideration at all. The differences between these approaches are slight, and they do not warrant this Court's intervention. For that reason, and because numerous circuits have not yet

squarely ruled on the issue presented by petitioner, this Court should await further percolation of the issue in the lower courts.[9]

Finally, it bears emphasizing that *no* circuit appears to have endorsed (in an actual holding as opposed to dictum) the absolute, inflexible reading of Section 1997e that petitioner is advocating here.[10] Even the United States government, which defends *Bivens* actions involving *federal* prisoners on a nationwide basis and thus has even greater reason than petitioner and her *amici* to adopt a narrow interpretation of Section 1997e, has rejected the extreme reading urged by petitioner here. See *Lunsford*, 155 F.3d at 1179 (in case involving *Bivens* claim, "agree[ing] with both parties" — including the United States — that a prisoner seeking only damages was "not required to exhaust his administrative remedies before filing this lawsuit in the district court in light of the fact that the [Bureau of Prison's] Administrative Remedy Program only provides for injunctive relief"); *Nyhuis*, 204 F.3d at 66-67 (noting in *Bivens* action

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[9] This case is also an inappropriate vehicle for resolving the modest tension between those circuits that excuse exhaustion where the remedy requested by an inmate is unavailable in the grievance procedure and those that also require that there be no other form of practical relief available to the inmate. Respondent would prevail under either test. He won under the first approach below, and he would also prevail under the Seventh Circuit's view because he has been transferred out of the facility whose conditions are the subject of his complaint and thus his only possibility of relief is through a damages remedy.

[10] California has made even more extreme arguments, without success, in other cases. See *Rumbles*, 182 F.3d at 1069-70 (in case involving other California prison officials, rejecting argument that Section 1997e requires inmates to exhaust not only futile California inmate grievance procedure but also separate administrative procedures under the California Tort Claims Act). Because the question presented in the petition is limited to "internal prison grievance procedures" (Pet. i), it forecloses the more extreme argument advanced and soundly rejected in *Rumbles*.

brought by federal prisoner that the United States had "suggested in [its] briefing and at oral argument that * * * a futility exception [to Section 1997e] may be appropriate under certain circumstances"). It is not this Court's traditional role to consider arguments that have not been adopted by *any* lower court.[11]

III. The Decision Below Is Plainly Correct.

The Ninth Circuit held that respondent, who has abandoned all but his damages claims, was not required under 42 U.S.C. § 1997e(a) to present his damages claims to California's inmate grievance procedure, because the procedure does not include any damages remedy to inmates. Pet. App. 2a. The lower court relied on several previous

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[11] Petitioner and her *amici* advance a variety of meritless arguments for why the issue presented in the petition is sufficiently important to warrant this Court's review. Pet. 10-12; *Amicus* Br. 3-8. For example, they maintain that the Ninth Circuit's approach "forecloses the possibility of an administrative resolution of disputes" (Pet. 10-11) and "undermin[es] the effectiveness of [state] administrative dispute resolution systems where they are needed most" (*Amicus* Br. 4). That argument rings hollow, because the Ninth Circuit excuses an inmate from exhaustion only where the administrative dispute process is *incapable* of resolving the dispute because the state has elected to withhold the only remedy sought by the inmate. Equally baseless is *amici*'s exaggerated contention (at 3-4) that the decision below "creates an exception that effectively abrogates the statute's general rule" requiring exhaustion, because "almost all prisoners seek damages." As explained above, every circuit other than the Tenth requires mixed claims to be exhausted; it is only where a prisoner seeks *only* damages (*and* where the grievance procedures *withhold* that remedy) that the Ninth Circuit excuses exhaustion. Nor does the decision below "thwart[] Congress's goal of reducing prisoner litigation." Pet. 10. Prisoner claims will hardly be resolved short of litigation by requiring inmates to go through a meaningless process that offers no hope of a remedy. Nor does the Ninth Circuit's decision "deprive [prison] officials" of "invaluable data about the nature and potential solutions" for problems within the prison walls. *Amici* Br. 6. Prisoner complaints brought under Section 1983 are served on individual defendants who are prison officers and officials, as well as relayed to lawyers in the Attorney Generals' offices who ordinarily defend these cases. Finally, as explained in text, the issue presented in the petition is not "critically important to the nation's more than 4,372 prisons and jails." *Id.* at 3. While prisoner lawsuits advancing mixed claims are commonplace in the federal courts, the majority of circuits have yet to resolve the precise issue presented in a damages-only context (and this even though the PLRA has been on the books for more than four years).

Ninth Circuit decisions (*Lunsford* and *Rumbles*) that reached the same result. In *Lunsford*, the Ninth Circuit "agreed with both parties" — including, as noted above, the United States government, which was representing the federal officials who were defendants — that Section 1997e(a) does not require a prisoner seeking only damages to "exhaust his administrative remedies before filing this lawsuit in light of the fact that the Administrative Remedy Program [in the Bureau of Prisons] only provides for injunctive relief." 155 F.3d at 1179. And in *Rumbles*, the Ninth Circuit affirmed a lower court's conclusion that "because California's administrative prison grievance process does not allow for monetary damages, this form of relief does not constitute an 'available' remedy that must be exhausted" within the meaning of Section 1997e(a). 182 F.3d at 1067.

Petitioner now argues that the Ninth Circuit's position is inconsistent with the language of Section 1997e(a). The argument is wrong. As the Ninth Circuit has explained, by its plain terms Section 1997e(a) only requires exhaustion of "such administrative *remedies* as are *available*." 42 U.S.C. § 1997e(a) (emphasis added). As the United States government cogently explained in *Lunsford*:

> By the time inmate Lunsford lodged the complaint in this case, in August, 1996, he has received his surgery. As is apparent from his Complaint, inmate Lunsford sought no corrective action at that time from the Bureau of Prisons and, more importantly, there was no corrective action possible (or "available," the term used in 42 U.S.C. § 1997e(a)). Because monetary compensation is not "available" to any *Bivens* plaintiff through the administrative remedy system, the

> Appellees conceded it would have been futile for inmate Lunsford to have exhausted administrative remedies in August 1996.

Appellees' Petition for Rehearing, *Lunsford* v. *Jumao-As*, No. CA 96-56503, at 5-6. That interpretation of Section 1997e(a), which the United States government urged with respect to what was then an open question in the Ninth Circuit (and which was presumably also approved by the Solicitor General), is eminently correct. Accord *Perez*, 182 F.3d at 538 (per Easterbrook, J.) ("If the [inmate's] injury has healed by the time suit begins, nothing other than damages could be a 'remedy,' and if the administrative process cannot provide compensation then there is no administrative remedy to exhaust.").

Petitioner argues, however, that Section 1997e overrules the traditional futility exception to administrative exhaustion and compels inmates to go through the pointless exercise of submitting their complaints to any grievance procedure that exists, regardless of whether it offers any prospect of a remedy. Pet. 6-7. Petitioner is simply seeking to rewrite the statute, which requires prisoners to exhaust "all administrative *remedies* as are *available*" — not to exhaust "all administrative *procedures* that are *in existence*." Moreover, the ordinary meaning of the words "available" and "remedy" are, respectively, "obtainable" and "[t]he means by which * * * the violation of a right is * * * redressed or compensated." BLACK'S LAW DICTIONARY 123, 1163 (5th ed. 1979). If an inmate grievance process does not offer

any means by which the violation of an inmate's rights may be redressed, it does not offer him any "remedy" that is "available."

Unable to find support in the language of Section 1997e(a), petitioner falls back on the legislative history, which she contends "irrefutably establishes that Congress intended exhaustion to be mandatory regardless of the effectiveness of the available administrative process." Pet. 7. To support that sweeping assertion, petitioner points to Congress's omission of the phrase "plain, speedy, and effective" from a prior version of Section 1997e. *Ibid.* But the prior version of Section 1997e imposed a duty on the Attorney General to promulgate minimum standards for "plain, speedy, and effective" state inmate grievance procedures, and required either the Attorney General or a federal court to certify that a state procedure, taken as a whole, satisfied these standards before exhaustion could be required. 42 U.S.C. § 1997e(a) (1994); see *Patsy* v. *Board of Regents*, 457 U.S. 496, 509-11 (1982). Because the PRLA eliminated this requirement of pre-certification of state grievance systems, it dropped the "plain, speedy, and effective" language from Section 1997e. It does not follow that Congress intended to abrogate the traditional futility exception in every individual case. Neither is it true that honoring the traditional futility exception in individual cases will reinsert the omitted language into Section 1997e or deprive the amendments made by the PLRA of "'real and substantial effect.'" *Nyhuis*, 204 F.3d at 72 (quoting *Stone* v. *INS*, 514 U.S. 386, 397 (1995)).

Equally mistaken is petitioner's argument that the decision below "ignores the * * * legislative history of § 1997e." Pet. 6. To begin with, "it must be acknowledged that the PLRA was not subject to very intense scrutiny or debate in Congress." Kuzinski, *The End of the Prison Law Firm?*, 29 RUTGERS L.J. 361, 376 n.79 (1998). As Professor Herman has explained:

> The legislative process leading to the passage of the PLRA was characterized by haste and lack of any real debate. The Act was passed as a rider to the Balanced Budget Downpayment Act, without a Judiciary Committee Report and without committee mark-up. Its provisions, which amend a number of different sections of the United States Code, bear many signs of the haste with which they were passed. Key terms were not defined, some provisions conflicted with pre-existing law, and even the title could have used editing: entitled The Prison Litigation Reform Act of 1995, it was actually passed in 1996.

Herman, *Slashing and Burning Prisoners' Rights: Congress and The Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1277 (1998) (citations omitted). Moreover, the isolated floor statement of Representative Lobiondo on which petitioner premises her entire argument relates to a bill, H.R. 2076, that was vetoed by President Clinton. See Presidential Veto Message of H.R. 2076, H. Doc. No. 104-149 (1995); Postponing Consideration of Veto Message on H.R. 2076, 141 Cong. Rec. H 15156 (daily ed. Dec. 19, 1995) (statement of Rep. Rogers). In any event, Representative Lobiondo's statement does not say that prisoners must resort to prison grievance procedures even when it would be futile to do so. It says that Representative Lobiondo hoped to require prisoners who are "contesting" some aspect of their incarceration — a word that

suggests a request for prospective changes rather than damages for a past event — to submit their claims first to an "administrative *remedy* process."

As for petitioner's various policy arguments, they are all misplaced. See also note 11, *supra*. Federalism or efficiency values are simply not offended by allowing prisoners who are claiming that their constitutional rights have been violated by state officials to avoid state grievance procedures that offer no possibility of resolving the prisoner's claims. Conspicuously absent from the petition, moreover, is any acknowledgement that, in *McCarthy* v. *Madigan*, 503 U.S. 140 (1992), this Court *unanimously* rejected many of the same policy arguments advanced by petitioner in holding that a federal prisoner seeking only damages in a *Bivens* action need not exhaust the administrative procedures in the Bureau of Prison, because these procedures do not include a damages remedy. *Id.* at 152-56. The same concerns apply with equal force here and confirm the correctness of the Ninth Circuit's approach.

Moreover, petitioner is wrong to suggest that the Ninth Circuit's approach places onerous burdens on the federal judiciary. Pet. 11. If the reported cases are any indication, the vast majority of prisoner lawsuits involve either non-damages claims only or "mixed" claims — lawsuits that (in all but the Tenth Circuit) are subject to Section 1997e's exhaustion requirement. In the small number of damages-only cases, it should be readily apparent from the face of the pleadings alone that the prisoner is limiting his claim for relief to damages (or some kind of claim as to which no remedy

is available in the grievance process). In addition, because exhaustion is an affirmative defense, it is reasonable to expect that defendants will conduct the initial screening and raise the exhaustion issue only where there is a valid argument to be made. Finally, the burden on courts in excusing a small category of prisoner cases from exhaustion is not necessarily any greater than the burden of requiring automatic exhaustion in that category. The reason is straightforward: when the cases ordered to be exhausted return to the federal courts, judges will sometimes have to resolve difficult questions about the meaning of state grievance procedures (such as whether all remedies have been exhausted in a timely fashion). Cf. *Patsy*, 457 U.S. at 513-14. The district court in this case took note of some of these difficult questions. See pages 4-5, *supra* (quoting Pet. App. 20a-21a).[12]

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[12] We note that petitioner in this case was a key decisionmaker in the very administrative grievance process to which she claims respondent was required to submit his damages claims. It would strange indeed — and possibly a due process violation — to require an injured prisoner to submit his claim to the very person he holds responsible for depriving him of his constitutional rights. See *McCarthy*, 503 U.S. at 153 (noting that "it appears that prison officials — perhaps the very officials subject to suit — are charged with" making decisions under the grievance procedure); *Felder* v. *Casey*, 487 U.S. 131, 149 (1988) (Wisconsin notice-of-claim statute, in Section 1983 action, "forces [the] injured persons to seek satisfaction from those alleged to have caused the injury in the first place").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY 2000

No. 99-1730

In the Supreme Court of the United States

SILVIA H. GARCIA,

Petitioner,

v.

MONROE JONES,

Respondent.

CERTIFICATE OF SERVICE

I, Alan E. Untereiner, counsel of record for the respondent and a member of the bar of this Court, hereby certify that on this 14th day of July, 2000, I caused the MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and the BRIEF IN OPPOSITION to be served by first-class mail, postage prepaid, on each of the following:

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David P. Druliner
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I further certify that all parties required to be served have been served.

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